87-1928

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Case No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ARLENE B. SINGER, et al.,

Petitioner,

vs.

SHANNON & LUCHS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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38 pp

A. QUESTIONS PRESENTED FOR REVIEW

1. Concerning an award of attorneys' fees in a diversity case in federal court, does state law, rather than federal law control the determination of the award?

2. Where a party countersues on a promissory note for attorneys' fees, the note containing no provision for such fees, may a court lawfully award fees based on the security agreement.

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I
PETITION

Petitioners respectfully pray, pursuant to 28 U.S.C. Section 1254, that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on November 20, 1987

A. QUESTIONS PRESENTED FOR REVIEW

1. Concerning an award of attorneys' fees in a diversity case in federal court, does state law, rather than federal law control the determination of the award?

2. Where a party countersues on a promissory note for attorneys' fees, the note containing no provision for such fees, may a court lawfully award fees based on the security agreement.

B. PARTIES INVOLVED

The parties involved in the proceeding below are:
I. Arlene B. Singer and Joel D. Joseph, Appellants.
II. Shannon & Luchs Company, Appellee.

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D. REFERENCE TO OFFICIAL REPORTS

The decision of the District of Columbia Circuit of November 20, 1987 is not reported. It is reproduced at page 13 of the appendix to this petition. The opinion of the district court is reported at 670 F. Supp. 1024 (February 10, 1987) and is reproduced in the appendix. An earlier decision of the Court of Appeals in this case was reported at 779 F.2d 69 (December 10, 1985) and it is reproduced in the appendix.

E. JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(1). The time requirements of 28 U.S.C. Section 2101 have been met.

1. The date of the judgment or decision that is sought to be reviewed is November 20, 1987.

2. Petitioners' motion for reconsideration was denied on January 19, 1988.

3. No cross petition for a writ of certiorari was filed.

4. Jurisdiction is supported under Rule 17.1(a) and 17.1(c) in that the instant case involves an important question of federal law which should be settled by this court; the decision of the District of Columbia Circuit is in conflict with decisions of other circuits, which are detailed in Section G; and the decision of the District of Columbia Circuit conflicts with decisions of this court.

F. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Ten

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

G. STATEMENT OF THE CASE

Petitioners entered into two contracts with respondent, one a listing agreement to sell their District of Columbia house and the other an equity advance agreement, which provided that if the house did not sell within a certain period, that respondents would arrange for a bridge loan so that petitioners could move into a new home. The house did not sell and a six month loan for $90,000 was arranged with a bank. Unbeknownst to petitioners the loan was guaranteed by respondents. Because the District of Columbia house remained unsold petitioners asked for an extension of the loan, but no extension was granted. When the note became overdue respondents paid the note to the bank and the note was assigned to it.

Petitioners filed suit against respondent in the federal district court for the District of Columbia claiming that respondent had breached the listing agreement by failing to make efforts to sell their house, for violating a District of Columiba law which prohibited "balloon" mortgages, for conflicts of interest regarding the interest that they secretly obtained in petitioners' property and for illegally fixing the rate for real estate commissions. Although several alternative bases regarding jurisdiction were cited in the complaint, diversity of the parties provided unquestioned jurisdiction. Respondent filed a counterclaim on the note. The counterclaim and the District of Columbia statutory claim were decided on a motion for summary judgment. The federal antitrust claim, the conflict of interest and the breach of contract claims were settled by the parties, leaving only the issue of attorneys' fees.

The attorneys' fees aspect of this case was before the court of appeals on three occasions. In the first appeal an award of $15,000.00 for attorneys' fees was summarily reversed (January 26, 1983, before Judges Robinson, Wilkey and Ginsburg) on the grounds that the "record reveals an absence of any documentation whatsoever of the legal services rendered in this case. Some documentation is required to enable the District Court to determine a reasonable and equitable fee and to afford the opposing party an opportunity to present legitimate objections." On that appeal the court awarded appellants costs and denied costs to appellees.

On remand the district court awarded $78,115.60 for attorneys' fees and expenses. Once again the court reversed. 779 F.2d 69 (December 10, 1985, Judges Wright, Edwards and Davis). On remand the district court again awarded substantial attorneys' fees and the court of appeals affirmed without an opinion on November 20, 1987. A petition for reconsideration was denied on January 19, 1988.

H. REASONS FOR ALLOWANCE OF THE WRIT

1. THE COURT OF APPEALS DECISION DIRECTLY CONTRADICTS RULINGS OF THIS COURT.

As early as 1902, thirty-six years before *Erie R.R. v. Thompkins*, 304 U.S. 64 (1938), this court approved the application of state attorneys' fee provisions in federal diversity suits at common law. *Fidelity Mutual Life Ass'n v. Mettler*, 185 U.S. 308 (1902). Within a week after deciding *Erie* this court applied this doctrine to equity suits based on diversity jurisdiction. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202 (1938).

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 420 U.S. 240 (1975), this court reaffirmed the application of state attorneys' fee provisions in federal diversity cases:

> "In an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." 421 U.S. 259, n.31 quoting 6 Moore's Federal Practice Par. 54.77(2) at 712-13 (2d ed. 1974).

The court of appeals directed the district court to "consider the reasonableness of the attorneys' fees incurred by the appellees in light of the analysis outlined in *Concerned Veterans*." The district court applied the lodestar fee as specified in *National Association of Concerned Veterans v.*

Secretary of Defense, 675 F.2d 1319 (D.C. Cir 1982), without considering the overall reasonableness and equities involved as required by the District of Columbia Court of Appeals. *Wisconsin Avenue Associates, Inc. v. 2720 Wisconsin Avenue Cooperative Association, Inc.*, 441 A.2d 956 (D.C. Court of Appeals, 1982). In addition to the District of Columbia case law there are statutes which serve as guidelines for awards of attorneys' fees. For example, a District of Columbia statute provides that attorneys' fees in court-ordered foreclosure cases is limited to ten percent. D.C. Code section 26-708 (1981 ed.). The *Concerned Veterans* case concerns the award of federal statutory attorneys fees in a government-defendant case, where public policy, enunciated by Congressional mandate, compels the award of fees. The ruling of the court of appeals which applied federal law regarding attorneys' fees is directly contrary to the holding of this court in the *Alyeska* case.

This court has ruled that the reasonableness of an attorneys' fee award in non-statutory fee case is decidedly different from that of a statutory fee case. *City of Riverside v. Rivera*, 477 U.S. 561 (1986). *City of Riverside* is a civil rights statutory fee case, and while attorneys fees which are disproportionate to the recovery in a case concerning fundamental civil rights can be appropriate, such a ruling has no bearing on a contractual agreement between a creditor and a debtor.

Justice Rehnquist, in dissent in the *City of Riverside* case presents a strong argument that attorneys fee awards in all types of cases should be restricted, based on the amount in controversy and other considerations of reasonableness. 91 L.Ed 2d, 466 at 491. Justice Rehnquist provides a relevant example:

> Suppose that A offers to sell Blackacre to B for $10,000. It is commonly known and accepted that Blackacre has a fair market value of $10,000. B consults an attorney and requests a determination of whether A can convey good title to Blackacre. The attorney writes an elaborate memorandum concluding that A's title to Blackacre is defective,

> and submits a bill to B for $25,000. B refuses to pay the bill, the attorney sues, and the parties stipulate that the attorney spent 200 hours researching the title issue . . . 91 L.Ed 2d at 491.

Chief Justice Rehnquist then poses the question: "Does anyone seriously think that a court should award the attorney the full $25,000 which he claims?" He concludes that the fee, although based on hours spent, multiplied by the attorney's normal hourly rate, is unreasonable because it bears no relationship to the value of the underlying property in question.

The fees of respondents similarly have far exceeded the bounds of reason. The underlying note in question in this case was for $90,000. The district court awarded attorneys fees of more than 80 percent of that amount. Had respondent's lawyers sued them for recovery of attorneys fees, in Justice Rehnquist's opinion, they would not have recovered anywhere near what they sought. Why should the debtor be required to pay attorney's fees that the creditor could have avoided?

The court of appeals also disregarded a Supreme Court ruling on a matter of general common law. Where the terms of a note or bond differ from the terms of the related mortgage or deed of trust, the terms of the note control. *Railway Co. v. Sprague*, 103 U.S. 756 (1880).

2. THE RULING OF THE COURT OF APPEALS IS IN CONFLICT WITH RULINGS OF OTHER CIRCUITS.

Most of the circuit courts have decided that in diversity cases attorneys' fees are determined by state law. *Grand Union Co. v. Cord Meyer Dev. Co.*, 761 F.2d 141 (2d Cir., 1985); Montgomery Ward v. Pacific Indemnity Co., (3d Cir., 1977); *Toland v. Technicolor*, (5th Cir., 1972); *Telco Leasing v. Transwestern Title*, 630 F. 2d 691 (9th Cir., 1980).

This court recently granted certiorari to review a closely

related issue in *Budinich v. Becton Dickinson and Co.*, No. 87-283. In that case the court is determining the procedural process for applications for attorneys' fees in diversity cases. There is a split in the circuits regarding the issues presented by that case. The decision in *Budinich* may control the result in this case. Petitioners request that certiorari be granted, and that if appropriate, this case be reversed, with directions for the court of appeals to reconsider its decision in light of this court's decision in *Budinich v. Becton Dickinson and Co., supra.*

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7053 September Term, 1987

ARLENE B. SINGER, *et al.*,
Appellants,
v. November 20, 1987

SHANNON & LUCHS COMPANY, *et al.*,
Appellees.

APPEAL FOR THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

Before ROBINSON and WILLIAMS, *Circuit Judges*, and
MYRON L. GORDON*, *Senior District Judge*

JUDGMENT

This cause come on for consideration on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued by counsel. The issues have been accorded full consideration by the Court, and occasion no need for an opinion. *See* Local Rule 14(c).

On consideration thereof, the Court, being in substantial agreement with the reasons and conclusions expressed in the memorandum opinion and order of the District Court, *Singer v. Shannon & Luchs Company, Civ. No. 82-151 (D.D.C. Feb. 10, 1987), it is*

ORDERED and ADJUDGED by the Court that the judgment of the District Court appealed from in this cause be and hereby is affirmed. It is

FURTHER ORDERED by the Court, sua sponted, that the Clerk withold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See Local Rule 15.*

Per Curiam
For the Court
/s/ George A. Fisher, Clerk

* Of the United States District Court for the Eastern District of Wisconsin, sitting by designation pursuant to 28 U.S.C. Section 294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7053 September Term, 1987

ARLENE B. SINGER, *et al.*,

v. January 19, 1988

SHANNON & LUCHS COMPANY, *et al.*,

Before ROBINSON and WILLIAMS, *Circuit Judges*, and MYRON L. GORDON*, *Senior District Judge*

ORDER

Upon consideration of appellants' petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT: CONSTANCE L. DUPRE, CLERK
BY: /s/Robert A. Bonner, Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARLENE B. SINGER, *et al.*,

Plaintiffs,

v. Civil Action No. 82-151

SHANNON & LUCHS COMPANY, *et al.*,

Defendants.

MEMORANDUM OPINION

The court once again considers motions by Shannon & Luchs for attorney's fees in litigation with Arlene Singer and Joel Joseph. Now before the court are Shannon & Luchs' motion for attorney's fees and expenses, and Shannon & Luchs' motion for attorney's fees and expenses incurred in connection with its fee application. This case is on remand from the Court of Appeals, which directed that we state with specificity our calculation of attorney's fees awarded to Shannon & Luchs, especially with regard to the work done on the successive appeals in this case. Shannon & Luchs has presented petitions for attorney's fees supported by detailed documentation of the hours expended on this litigation and affidavits setting forth the hourly rates charged by the various attorneys employed in this case. Plaintiffs oppose both motions for fees and expenses.

Background

In order properly to evaluate the fee applications, it is necessary to detail the long, circuitous and tortured journey this case has taken through the judicial system. This case arises out of a $90,000 loan advanced by the National Savings and Trust Company (NS&T) to Joel Joseph and Arlene Singer (plaintiffs) in April, 1981. Plaintiffs sought this loan in order to purchase another home. Plaintiffs executed a promissory note to cover the loan; repayment of the note was guaranteed by Shannon & Luchs and was secured by a deed of trust to American Security Bank on plaintiffs' property on Foxhall Road in the District of Columbia. By the terms of the note and the deed of trust,

payment of the entire amount of principal and interest was due within 180 days, or upon the sale of the Foxhall Road property, whichever occurred first. Shannon & Luchs was exclusive broker of plaintiffs' Foxhall Road property.

For reasons which are not of record, the Foxhall Road property did not sell, Plaintiffs refused to pay the note when it came due, so NS&T called upon Shannon & Luchs to satisfy its guarantee. Shannon & Luchs paid the principal and interest due, an amount totalling $86,696.88, to NS&T, following which Shannon & Luchs commenced steps toward foreclosure, In order to prevent foreclosure, plaintiffs on January 18, 1982, filed this action against Shannon & Luchs alleging antitrust violations, violations of D.C. law governing second mortgages, breach of Shannon & Luchs fiduciary duty as real estate agent for plaintiffs, and breaches of the broker listing contracts. Plaintiffs also moved for a temporary restraining order to prevent foreclosure.

On January 29, 1982, Judge Penn, by stipulation and order, directed plaintiffs to pay to Shannon & Luchs $2,100, in consideration for which Shannon & Luchs agreed not to proceed with foreclosure during the following two months, unless plaintiffs defaulted on the payment of the $2,100. After April 1, 1982, however, Judge Penn's order permitted Shannon & Luchs to proceed with foreclosure and forbade plaintiffs from seeking to enjoin or otherwise to restrain a foreclosure sale. By the terms of this stipulation and order, plaintiffs also withdrew their motion for a TRO.

Plaintiffs then filed a motion for summary judgment on Count II of the complaint, Count II alleged violations of the D.C. law governing the terms of mortgages, Defendants counterclaimed for liability on the note and cross-moved for summary judgment on Count II of the complaint and on its counterclaims. On March 18, 1982, this court denied plaintiffs' motion for summary judgment and granted of Shannon & Luchs' cross-motion for summary judgment. Judgment was so entered on the same day.

This case then made its first trip to the United States Court of Appeals when plaintiffs appealed from the grant of summary judgment. Shannon & Luchs moved to dismiss the appeal on grounds of lack of finality. The Court of Appeals granted this motion and dismissed the appeal on March 31, 1982. The court noted that an appeal would be proper if this court directed entry of final judgment on the adjudicated claims.

On April 21, 1982, plaintiff Joel Joseph shifted the area of combat by filing suit in the Superior Court for the District of Columbia. *Joseph v. Luchs,* Civil Action No, 5781-82 (hereinafter the *Joseph* action)[1], The complaint in *Joseph* alleged that Shannon & Luchs had breached its duties as trustees under the deed of trust by failing to make an independent determination of the need for foreclosure. One week later, on April 28, 1982, Joseph filed a motion for a temporary restraining order seeking to restrain the foreclosure in order for the court to have a chance to name new trustees. Defendant opposed the motion for a TRO, and filed & motion to stay the proceedings on April 28. In connection with this action, Joseph's deposition was taken on May 12, 1982, Defendant moved to dismiss under Fed. R. Civ. P. 41(b) on May 17, 1982. The litigation in the Superior Court also triggered a round of motions in this court, On April 28, 1982, Shannon & Luchs moved in this court to remedy plaintiffs' violation of Judge Penn's stipulation and order. After briefing and a hearing, this court ordered Joseph to comply with Judge Penn's January, 1982 order and to cease seeking relief restraining foreclosure. Order of May 20, 1982, We also directed Joseph to pay costs, excluding attorney's fees, incurred by Shannon & Luchs in filing both the motion to enforce Judge Penn's order January 29, 1982, and its opposition to the temporary restraining order filed in Superior Court.

On June 3, 1982, Joseph in compliance with this court's May 20 order, withdrew his motions in Superior Court for a TRO and for a preliminary injunction. With the June 16 date of the foreclosure sale fast approaching, Joseph, still undaunted, filed on June 8, 1982, an emergency motion to remove the trustees of the deed of trust. At a hearing on June 8, 1982, the Superior Court denied this motion. Plaintiff Joseph then sought an emergency ruling by the District of Columbia Court of Appeals, which denied his motion on June 15, 1982. The foreclosure sale then proceed as scheduled on June 16. The *Joseph v. Luchs* litigation in the Superior Court terminated four months later, with no intervening activity, when Judge Bowers of that court granted defendants' motion to dismiss on October 28, 1982.[2] Order of Oct. 28, 1982, Civ, No, 8781-82 (D.C, Super.).

The foreclosure sale did not, however, end litigation in this court, First, with respect to the amounts due under the promissory note, the foreclosure sale did not satisfy the full amount due. Shannon & Luchs then moved for an order

making this court's summary judgment final, pursuant to Fed. R. Civ. P. 54(b). The court granted this motion on September 17, 1982, and entered judgment for $96,696.88, 14 percent interest from October 27, 1981, foreclosure costs of $3,006, transfer tax of $780 and attorney's fees of $15,000.

This case then made its second trip to the United States Court of Appeals. After filing the notice of appeal, plaintiffs filed a motion for stay of judgment in this court, which was granted as to the attorney's fee award but which was denied as to all other parts of the judgment. Plaintiffs then filed a similar motion in the Court of Appeals, which was denied for lack of a supersedeas bond. Order of Nov. 1, 1982 (D.C. Cir.) (per curiam). Plaintiff next sought a summary reversal, which also was granted as to the attorney's fee award, but denied as to all other parts of the judgment. After briefing and oral argument, the Court of Appeals affirmed all the remaining portions of the judgment without opinion. Order of May 16, 1983 (D.C. Cir.). A petition for rehearing and the suggestion of rehearing en banc were both denied. Order of June 14, 1983 (per curiam); Order of June 28, 1983 (per curiam) en banc). The summary reversal and remand therefore concerned only this Court's award of attorney's fees of $15,000.

On remand, this court received an attorney's fees application, with supporting documentation, from Shannon & Luchs. Plaintiffs opposed. On January 10, 1984, we awarded Shannon & Luchs $78,115.60 in costs and attorney's fees. Final judgment on the attorney's fee award was entered on February 22, 1984. At the same time, Counts I, III and IV, which were not previously adjudicated on summary judgment, were dismissed with prejudice in accordance with a stipulation in which Shannon & Luchs agreed to pay plaintiffs $6,000. Plaintiffs then made a third trip to the Court of Appeals to challenge this court's attorney's fee award. The D.C. Circuit vacated this court's award of attorney's fees and remanded for further consideration, *Singer v. Shannon & Luchs*, 779 F.2d 69 (D.C. Cir. 1985). The Court of appeals directed us to consider and to specify the reasonableness of the attorney's fee award in light of that court's opinion in *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982). The court also wanted us to specify the areas of compensable activity and to clarify the grounds upon which fees would be awarded, whether pursuant to the attorney's fee provisions of.the note or on independent

grounds such as bad faith or vexatiousness. Further, the court directed that we reconsider the award of attorney's fees for the successful aspect of the earlier appeal, i.e., the previous award of attorney's fees of $15,000.

Discussion

Consideration of defendants' second application for attorney's fees, in light of the remand, presents two tasks. First, it is necessary to determine the appropriate attorney's fee award for all activities prior to the present fee application, To do this, we need to examine and to delineate the scope of the attorney's fees provision in the deed of trust, i.e., which activities in this litigation are subject to this provision; we also need to decide whether any independent grounds for attorney's fees exist to support a fee award as to any litigation not encompassed by the contractual fee provision. The second task will be to determine the reasonable fees and expenses recoverable in connection with the preparation and submission of the successful portions of Shannon & Luchs present fee application. For all activities for which a fee award would be proper, the reasonable amount of such fees is calculated in accordance with the "lodestar" method outlined in *National Ass'n of Concerned Veterans*

The job of calculating the reasonable attorney's fees due Shannon & Luchs is in two respects easier now than in January, 1984. First, there remains no question in this case as to whether the deed of trust can properly be interpreted to sustain a contractually-based attorney's fee award. In the Memorandum Order of January 10, 1984, this court noted that the language of the deed of trust was unambiguous in allowing "costs, expenses and attorney's fees incurred" with respect to the trust nd the promissory note. Order of January 10, 1984 at 2. The United States Court of Appeals agreed that the language of the deed and the promissory note supported *some* award of fees, *Singer*, 778 F.2d at 70, noting only that it might not be appropriate to award fees for the portions of the actions on which Shannon & Luchs was unsuccessful. Id. at 71. Thus, we can take it as established that the deed of trust authorizes an award of attorney's fees and expenses.

Shannon & Luchs has also eased the task by offering a more limited attorney's fee petition, In part addressing the concerns voiced by the Court of Appeals, Shannon & Luchs

has reduced the number of hours claimed for work in the Court of Appeals and reduced the number of hours claimed for discovery done on Counts I, III and IV of the complaint. Significantly, Shannon & Luchs also has not claimed any hours for work done on the most recent appeal which concerned the sole issue of attorney's fees.

I. The Scope of Activities Subject to a Fee Award

In determining the scope of activities subject to an award of fees, we first determine which of the claims litigated in this court and in the Superior Court are "related" to the note and deed of trust. Shannon & Luchs argues that all the claims litigated should be considered "related" to the deed of trust and note, and that Shannon & Luchs prevailed as to all claims raised by plaintiffs' complaint. A slightly more restricted interpretation of "related" actions is, however, more appropriate.

Because the deed of trust is a contract, the intent of the parties–or what reasonably can be inferred to have been the intent of the parties–governs the interpretation of the contract. A contractual attorney's fee provision can encompass fees incurred litigating claims other than those brought to before the contract. In interpreting similar provisions, other courts have held that where a fee applicant recovers on a claim subject to a contractual attorney's fee provision and in the process litigates a counterclaim on which he must prevail in order to recover on his claim, then the fee applicant is entitled to his attorney's fees for both the claim and the counterclaim. *Erickson Enterprises, Inc. v. Louis Wohl & Sons, Inc.*, 422 So.2d 1085 (Fla. App. 1982); *see also* Note, *Recovery of Attorneys' Fees Provided for In Bill, Note, or Similar Evidence of Indebtedness, as Affected by Opposing Party's Recovery*, 48 A.L.R. 2d 677, 683. This test has not, however, been used as a limiting principle in interpreting the scope of an attorney's fee provision.

In the absence of any evidence of the actual intent of the parties, we interpret the attorney's fee provision in the deed of trust to allow recovery of fees as to all issues concerning the note, the deed of trust, the performance of the trustees of the trust, or the enforcement of any claims or entitled to recover all the attorneys' fees incurred with respect to the actual foreclosure, all fees incurred litigating Count II of the complaint and both of Shannon & Luchs counterclaims, as well as all fees generated by the *Joseph v. Luchs* litigation

in the Superior Court,[3] Recovery of fees in *Singer* for all discovery matters prior to this court's initial grant of summary judgment in March, 1982 is also allowed, but Shannon & Luchs cannot recover fees incurred for discovery taken after that date in the *Singer* action.[4] Shannon & Luchs also cannot recover fees for any work on Counts I, III and IV of the complaint because these arise from plaintiffs' real estate brokerage contract with Shannon & Luchs rather than from plaintiffs' obligations under the note &nd deed of trust. The recovery of the fees incurred in responding to the complaint and to the January, 1882 motion for a temporary restraining order will be allowed regardless of which count of the complaint was litigated; at the initial stages the collateral issues were still inextricably linked with the actions on the note and trust deed.

As to those fees not within the scope of the contractual fees provision, although plaintiff was willing to settle the claims on Counts I, III, and IV of the complaint for a mere $6,000–an amount which, in this court's experience, indicates a nuisance value settlement–we have in our discretion decided not to award fees based on vexatiousness and *bad faith*, however justified such an award might be. The attorney's fee award to Shannon & Luchs is therefore limited to those fees justified by the *contractual* undertakings of the parties.

II. Calculating the Reasonable Attorney's Fees

A. The Reasonable Hourly Rate

The Court of Appeals laid out its guidelines for determining the reasonable hourly rate in *Laffey v. Northwest Airlines*, 746 F. 2d 4 (D.C. Cir. 1984). In that case, the Court of Appeals, on the grounds of both congressional intent and administrability, equity and efficiency, established a presumption of reasonableness in favor of the rates charged in private representation. The court stated emphatically:

> . . .when fixed market rates already exist, there is no good reason to tolerate the substantial costs of turning every attorney's fee case into a major ratemaking case. In almost every case, the firms established

billing rates will provide fair compensation.

Id. at 24 (emphasis in original). The court later again state "*So long as the firm's own rate falls within the rate brackets, it is the market rate for the purposes of calculating the lodestar.*" *Id.* at 25 (emphasis in original).[5]

Shannon & Luchs has submitted affidavits from Mr. Richard Luchs of King & Nordlinger and from Mr. James Mercurio of Arent, Fox, Kintner, Plotkin and Kahn (hereinafter Arent, Fox). Mr. Luchs' affidavit attests that the standard rate for all Shannon & Luchs work performed by his firm is $80 per hour. Mr. Mercurio's affidavit testifies to the rates typically charged by Arent, Fox for the work of each of the attorneys, law clerks, legal assistants and billable staff.

Plaintiffs object, however, because Shannon & Luchs has not submitted any affidavits from other attorneys attesting to "bracket" rates defining the scope of reasonable market rates. Plaintiffs argue that, by not producing these affidavits, Shannon & Luchs has failed to meet its burden of proving the reasonableness of the hourly rates charged by Arent, Fox and King Nordlinger. While Shannon & Luchs might have submitted affidavits from several other law firms listing the ranges of their attorney's fees, to deny Shannon Luchs' motion solely on this ground would be to honor form over substance, from its experience both as a private practitioner and in adjudicating other attorney's fee awards, the court knows that the rates claimed are well within the range of rates charged by firms comparable to King & Nordlinger and Arent, Fox.

Plaintiffs object that Shannon & Luchs has failed to adduce any evidence of the rates usually charged for collections oases or for cases of indebtedness secured by mortgages; the affidavits attest only to the rates generally charged by King & Nordlinger and Arent, Fox in their legal practice, regardless of the particular type of work. Plaintiff, citing 85 Am. Jur. 2d, Mortgages Section 627 and a collection of cases from various jurisdictions, argues that fees, if awarded, usually are from two to ten percent of the balance of the mortgage due when suit was filed. Opp. at 12. Plaintiff also cites provisions of the D.C. Code allowing attorney's fees of ten percent on foreclosures of property by "money lenders" licensed by the District[6] and fifteen percent in consumer credit collections. D.C. Code Section 28-3806. These authorities are not helpful in determining

the reasonable hourly rate under the protracted and unusual facts of this litigation. First, both D.C. statutes are designed to govern small *transactions* with routine collections, The cases and the note cited are also not apposite since, as the history of the litigation demonstrates, this case is anything but a routine collection case. The usual foreclosure does not involve two attempts for TRO'S in both the District and Superior Court of the District, emergency motions in the Superior Court and in the D.C. Court of Appeals, and an appeal to the D,C, Circuit on the issue of liability on the note and the note's compliance with D.C. Code Section 28-3301(c), Given the length and intensity of this litigation, the market rates charged by King & Nordlinger and Arent, Fox for general litigation services are appropriate rates. Thus, we adopt these rates as the reasonable hourly rates for the purposes of calculating a "lodestar" fee.

B. Reasonable Number of Hours Expenses

We turn to examine Shannon & Luchs' fee application to determine if the hours claimed for activities within the scope of attorney's fees provisions of the deed of trust are reasonable. Shannon & Luchs has submitted copies of its computerized time records, as well as summaries of these records in support of its application. These records meet the requirements set forth by the Court of Appeals in *National Association of Concerned Veterans*, 675 F.2d at 1327. Shannon & Luchs' fee application requests fees starting in November, 1981 and ending in September 1983, a period of twenty-two (22) months.

For November and December, 1981, Shannon & Luchs asks fees of 3.4 hours of work. Since this activity took place prior to the filing of this lawsuit, there is no danger of allowing recovery on non-prevailing claims. At that time, Shannon & Luchs was preparing to foreclose on the Foxhall Road property or to take other steps to enforce the note and the deed of trust. These fees, for conferences and preliminary work, seem reasonable and are within the scope of the deed of trust. Thus, recovery of these fees will be allowed.

In January, 1982, all activity surrounded the filing of the action, the motion for a TRO, and the entry of the stipulation and order of Judge Penn. As previously

indicated, all these hours are within the scope of the deed of trust. We also find that the hours claimed by Shannon & Luchs for work done both by Arent, Fox and by King & Nordlinger were reasonably expended considering the amount and level of activity during that month. Thus, Shannon & Luchs can recover all fees claimed for this month.

In February 1981, the time claimed was expended in order to answer the complaint and to prepare and to file defendant's successful opposition to plaintiffs' motion for summary judgment and the motion for summary judgment on the counterclaims and on Count II, This time appears to have been reasonably expended, and it is within the scope allowed by the deed of trust. Thus, recovery for these hours is allowed.

For March, 1982, of the fees requested by Shannon & Luchs, we deduct 2.0 hours of time spent by J. Mercurio for work on the notice of deposition and request for documents and preparing the opposition to the motion for a protective order, These excluded fees lie outside the scope of the deed of trust because they relate solely to the claims arising out of the brokerage agreement rather than from the deed of trust. All other hours are allowed as reasonable, including the hours expended to oppose plaintiffs' first appeal of the March 18 summary judgment.

Of the time expended in April, 1982, the vast majority was spent litigating the *Joseph v. Luchs* action in Superior Court nd the motion brought in this court to enforce Judge Penn's order, We will disallow, however, 4.0 hours expended by J. Mercurio for the Singer deposition, for the request for documents, for the interrogatories, and for conferences with G. Marx, on April 6 and 18 as beyond the scope of the deed of trust, For G. Marx, in addition to the 3.0 hours deducted by Shannon & Luchs for the Singer deposition, we further deduct 2.0 hours for conference with J. Mercurio on April 6 and for preparation of questions for the Joseph deposition[7] as well as 3.2 hours spent on preparing a request for production of documents and interrogatories. The remainder of the hours expended by Arent, Fox and King & Nordlinger appear to be reasonable.

For May, 1982, the principal deductions made from the Shannon & Luchs request are for discovery other than the deposition of Joseph on May 12, 1982, and for work apparently duplicative or unused. For J. Mercurio we deduct 1.0 hours spent preparing interrogatory answers,

opposition and objections. All the time for G. Marx is deducted since its relates to interrogatories, or is for review of "splitting cause of action," for which there is no indication that such work was used in litigation. Of the time requested for J. Bartoo, 9.4 hours for preparation of objections and answers to interrogatories are deducted, as well as 9.1 hours spent reviewing the file and interrogatory answers, which seem unnecessarily duplicative. In addition 2.0 hours of conference time for J. Bartoo are also deducted. Of D. Whiddon's time, the 1.5 hours spent on Judge recusal work is excluded because the issue of recusal was not a part of this case. The remainder of the hours expended and claimed were related to compensable aspects of the case and were reasonably expended.

Of the time expended by Shannon & Luchs attorneys from June 1- 16, 1982, virtually all the time relates either to the flurry of eleventh hour activity in *Joseph* or to the foreclosure sale. This all falls within the scope of the deed of trust and is reasonable in light of the substantial amount of litigious activity. We deduct only 0.2 of J. Mercurio's time spent preparing deposition. The remainder of the hours for June 1-16 are allowed.

Of the hours claimed for June 17-30, 1982, most of these hours are compensable portions of the *Joseph* litigation. We deduct the 12.8 hours spent by G. Marx on a response to a motion to compel filed by plaintiffs and 20.0 hours spent by J. Stuckey on research on an abuse of process motion–which was never filed– and on the admissibility of evidence presented during previous litigation. All other hours are allowed, including the hours related to the motion to dismiss the *Joseph* action.

For the time expended in July and August, 1982, Shannon & Luchs requests compensation for work relating to plaintiffs' motion to amend the March 8, 1982 summary judgment and for the option to dismiss *Joseph v. Luchs*. These hours are compensable under the deed of trust and appear to be reasonably expended. Thus, all requested hours are allowed for July and August, 1982.

For September 1982, the hours claimed by Shannon & Luchs elate primarily to the plaintiffs' motion to stay judgment. Since plaintiffs succeeded in staying the judgment as to $15,000 of a $115,452.98 judgment, Shannon & Luchs can only recover 87 percent of the hours expended on the motion to stay the judgment during this month. In addition, we deduct 1.8 hours spent on conferences and

letters to Rucci, whose deposition was taken during September, 1882. This means that Shannon & Luchs can be compensated for .6 hours for G. Marx, 7.7 hours for J. Mercurio, 6.1 hours for D. Personette, and 3.0 hours for C. McDaid. The hours claimed for King & Nordlinger will be allowed in full since these are related to the motion to dismiss *Joseph* only. For October, 1982, we deduct all time spent litigating the plaintiffs' motion to compel. This encompasses 6.5 hours for G. Marx and 0.5 hours for J. Mercurio. We also exclude 2.3 hours for J, Mercurio relating to the Bernstein deposition. We allow in full the hours accumulated on a hearing on the motion to dismiss *Joseph*; and we allow 87 percent of 4.3 hours expended by J. Mercurio on the motion to stay judgment, i.e. 3.7 hours. The hours for King & Nordlinger are allowed as reasonable.

For November, 1982 all the hours claimed relate either to the execution of the unstayed judgment or to plaintiffs' Largely unsuccessful motion at the D.C. Circuit for summary reversal, As to the hours for enforcement of the judgment, these hours are allowed under the note and are reasonable, As to the hours expended on the motion for summary reversal, Shannon & Luchs is clearly entitled to recover most of these fees, since summary reversal was denied as to all aspects of the judgment except the attorney's fee award. Since Shannon & Luchs has deducted 20 percent of its expenditures in connection with the main appeal, a figure we find to be a more than reasonable division. between the attorney's fee issue and the other issues on appeal, we also apply this figure to the motion for summary reversal.[8] As such, of the 2.2 hours claimed for J. Mercurio on the motion for summary reversal, we allow recovery for 1.7 hours; for D. Personette, we allow recovery for 3.4 hours.

For December, 1982 through May, 1983, all the hours claimed relate to the appeal. Applying the same 20 percent reduction, Shannon & Luchs may recover only for 8.2 of the 8.8 hours claimed for December, 1982, all hours claimed on behalf of Arent, Fox for January, 1983, 1.0 hours for King & Nordlinger for January, 1883, 0.5 hours for Arent, Fox for February, 1983, 8.5 hours for Arent, Fox for March, 1983, 0.3 hours for King & Nordlinger for April, 1983, 1.9 hours for King & Nordlinger for May, 1883, and all hours claimed for Arent, Fox for May, 1983. These hours all represent 80 percent of the total hours spent working on the appeal for each month.

As to the hours claimed for July through September, 1983, these hours represent work on the enforcement of the hours are allowable under the deed of trust, and are reasonable in amount, except the 2.0 hours claimed for J. Mercurio in September to attend a status call is deducted.

The Lodestar Fee

Having determined the reasonable hourly rate and the reasonable number of hours expended, all that is left is to calculate the lodestar fee. This calculation is summarized in Exhibit 1, attached to this opinion. In total, Shannon & Luchs is entitled to received $53,750.90 in attorney's fees for all compensable litigation up to, but not including, the time expended in preparing this fee application. As we stated in connection with our previous fee award, this award, seemingly disproportionate to the amount of the note, has been "caused by plaintiffs own obstructive behavior in pursuing every device to prevent the foreclosure from taking place." Order of January 10, 1984 at 2. This lodestar figure represents a reasonable attorney's fee due under the terms of the deed of trust.

III. Reasonable Expenses Claimed in the July 1986 Petition

In order to award costs, these too must be segregated to include only those costs within the scope of the deed of trust and incurred in connection with successful litigation. Of the expenses submitted for reimbursement, Shannon & Luchs cannot recover any transcript costs, except those incurred in connection with the May, 1982 deposition of Joel Joseph. The remaining expenses are, however, hot so easily segregated. For these expenses, such as copying, messenger fees, phone charges, the costs will be apportioned based on the percentage of billable hours for which recovery of the fees is allowed.

The total amount of expenses claimed by Shannon & Luchs through September, 1983 is $4,588.23. Of this amount, transcript costs of $460.36 are excluded. On the remaining amount 86.6 percent of the expenses are compensable, reflecting the same percentage recovery as for the hours of billable personnel time claimed by Shannon & Luchs.[9] The total amount of expenses due Shannon & Luchs is $3,574.74.

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IV. Attorney's Fees & Expenses Incurred Preparing the Fee Application

Shannon & Luchs has also petitioned for an award of the attorney's fees and expenses incurred in connection with the present fee application. Plaintiffs do not dispute that Shannon & Luchs is entitled to such an award (this is incorrect). Plaintiffs object, instead, on the same grounds as for the principal petition for attorney's fees, asserting failure to prove that the rates claimed are reasonable rates and arguing that the aggregate attorney's fee request is excessive.

Because Shannon & Luchs' petition for fees incurred in connection with the fee application is accompanied by an affidavit from Mr. Mercurio similar to the affidavit accompanying the principal application, plaintiffs' objections as to the reasonableness of the hourly rates are rejected for the same reasons that the same objections were rejected in the context of the principal fee award. Again, we find, based on our experience, that Arent, Fox's usual hourly rates &re within the range of fees charged by firms of comparable stature for commercial litigation.

As to the aggregate amount of fees claimed in connection with the present application for attorney's fees, we note that these amounts seem excessive. The D.C. Circuit has, however, mandated that we follow the lodestar method in assessing attorney's fees. Thus, an award of fees is appropriate for all hours reasonably expended. Plaintiffs point to no hours claimed that they consider to be excessive. In light of the detail required to sustain a fee application, we also cannot point to any unreasonably expended hours. The Court of Appeals has required that in activities for which fees are claimed be segregated, and that the petitioning party compile substantial documentation of the hours spent on these activities, and the purposes for which these hours were expended. Such detail takes time to assemble and to organize, and adds significantly to the cost of preparing a fee application.[10]

Petitioner cannot, however, recover fees and expenses for those parts of the attorney's fee application on which they did not prevail, Thus, the aggregate fees and costs for this motion will only be allowed in the same proportion that such aggregate fees and costs were allowed on the principal motion for fees and expenses. Since we have awarded fees

and costs totalling $57,325.64 of a total request by Shannon & Luchs of $65,242.13, Shannon & Luchs can recover 87.8 percent of the fees and expenses incurred in connection with the fee application. Thus, on Shannon & Luchs petition for fees and costs incurred in connection with its application for attorneys' fees we award petitioners $12,377.16 in attorney's fees and $278.34 in costs.

Conclusion

Upon consideration of the fee petitions submitted by Shannon & Luchs, Shannon & Luchs is entitled to $58,750.90 in attorney's fees and $3,574.74 in costs incurred during the litigation between plaintiffs and Shannon & Luchs. In addition, Shannon & Luchs shall receive attorney's fees of $12,377.18 and costs of $278.34 incurred in connection with its application for attorney's fees.

An order consistent with the foregoing has been entered this day.

/s/
John H. Pratt

Footnotes to Opinion

1. To distinguish the case in this court from the case in Superior Court, the case in this court will be referred to as the *Singer* case.

2. Plaintiffs assert in their opposition, Opp. at 5 n. 1, that the *Joseph v. Luchs* litigation ended pursuant to a stipulation and order. Plaintiffs have confused Judge Bowers' order ending the Joseph litigation with Judge Penn's stipulation and order of January 28, 1982.

3. Plaintiff asserts that Shannon & Luchs application for fees incurred in the *Joseph* litigation is barred by the *res judicata* effect of this court's May 20, 1982 order, which granted to Shannon & Luchs as sanctions the costs of its motion to enforce the January, 1982 stipulation and order and the costs of responding to the motion for a TRO in *Joseph*, but excluding attorney's fees, Plaintiffs' contention is without merit. *Res judicata* does not bar the present application because the court was only considering the appropriation sanction for a willful violation of a court order; the court was not interpreting the contractual attorney's fee provision. The claim for fees under the attorney's fee clause of the deed of trust is not merged into

the earlier prayer for sanctions.

4. Because the May 15, 1982 deposition of Joel Joseph was taken in connection with the *Joseph v. Luchs* litigation, and because this deposition was used extensively in support of the motions filed in the *Joseph* case, the fees for this deposition are allowed.

5. Although *Laffey* dealt with fees awarded under the Civil Rights Attorney's Fees Awards Act of 1978, the D.C. Circuit, in its decision in *Singer*, applied the law of attorney's fee awards developed under that act to contractually based fee awards. *See Singer*, 779 F.2d at 70-71. The same grounds of administrability, equity and efficiency hat justified the Court of Appeals' ruling in *Laffey* apply equally in this case.

6. D.C. Code Section 708. This section does not govern this case because banks and building and loans are exempt from its provisions and because the loan was greater than $10,000.

7. While preparation of questions for the Joseph deposition might be allowable, these hours are denied since they cannot be segregated from the hours spent on the Singer deposition.

8. This issue of the reasonableness of the attorney's fee award was one of several issues raised on appeal. Plaintiffs also challenged the propriety of entering a final judgment as to the issues on the note before reaching a final disposition of all issues in the litigation, appealed the grant of summary judgment on Count II of the complaint and on the balance due under the note, and disputed this court's interpretation of the deed of trust as authorizing a fee award. Notably, the issue of the amount of the fee award consumed only 7 pages of plaintiffs' 52 page appellate brief. Furthermore, because the reasonableness of the fee award issue was decided by summary reversal on January 26, 1986, work done after that date presumably dealt only with the issues on which Shannon & Luchs ultimately prevailed. With these considerations in mind, Shannon & Luchs deduction of 20 percent of its time on appeal seems more than adequate to ensure that compensation is not awarded for the portions of the appeal on which Shannon & Luchs did not prevail.

9. The number of hours of work allowed by the court (573.5 hours) represents 86.6 percent of the hours for which Shannon & Luchs has petitioned for reimbursement (662.1 hours).

10. Plaintiffs argue that the hours expended were excessive

considering that all that Shannon & Luchs has to do was to reorganize and to resubmit its previous applications. We cannot agree on two grounds. First, Shannon & Luchs, in resubmitting its application, eliminated hours that the Court of Appeals found questionable. This required work clearly beyond reorganizing and resubmitting the earlier petition. Second, even if we were to find these hours duplicative of earlier efforts and thus excluded recovery for some of the hours spent preparing the July, 1986 petition, Shannon & Luchs would then be allowed to recover some of the time spent preparing the attorney's fee petitions submitted prior to our January, 1984 award. Since plaintiffs have not objected to any specific portion of the hours now claimed by Shannon & Luchs, we need not parse these hours more specifically than necessary to exercise independent discretion.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5360

ARLENE B. SINGER and JOEL D. JOSEPH, APPELLANTS

v.

SHANNON & LUCHS COMPANY, ET AL., APPELLEES

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 82-0151)

Argued November 15, 1985

Decided December 10, 1985

Edward Lee Rogers, with whom *Joel D. Joseph* was on the brief for appellants.

Joyce L. Bartoo, with whom *Richard W. Luchs* and *James P. Mercurio* were on the brief for appellees.

Before: WRIGHT and EDWARDS, *Circuit Judges*, and DAVIS,* *Circuit Judge*, United States Court of Appeals for the Federal Circuit.

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* Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion PER CURIAM.

PER CURIAM: The appellants, Arlene B. Singer and Joel D. Joseph, appeal from the District Court's award of $72,255.50 in attorneys' fees and $5,860.10 in expenses to the appellees, Shannon & Luchs Company. Singer and Joseph argue that an award of fees is not appropriate and, in the alternative, that the amount awarded was excessive. We vacate and remand for a reconsideration and more complete explanation of the amount of the award.

Shannon & Luchs' application for attorneys' fees grew out of disputes over a loan made by the National Savings and Trust Company to Singer and Joseph. The loan was secured by Singer's and Joseph's property on Foxhall Road and guaranteed by Shannon & Luchs, with whom Singer and Joseph had signed an exclusive listing agreement to sell the Foxhall Road property. The appellants refused to pay the note when it came due and the bank obtained payment from Shannon & Luchs as guarantors. Shannon & Luchs then instituted foreclosure procedures on the Foxhall Road property.

In January, 1982, Singer and Joseph brought a diversity suit in the United States District Court, requesting an injunction to prevent the foreclosure sale and presenting a variety of legal challenges to the provisions of the note and deed of trust. Shanon & Luchs counterclaimed for the $90,000 plus interest due on the promissory note. Joseph also sued in Superior Court for the District of Columbia, in violation of a District Court order that prohibited the plaintiffs from seeking to restrain foreclosure during the pendency of the suit in District Court. In September, 1982, the District Court entered a final judgment for Shannon & Luchs for the amount owed on the note plus costs, including $15,000 in attorneys' fees. On appeal, this court affirmed the judgment on the note, but reversed and remanded on the issue of attorneys' fees because the award was unsupported by

appropriate documentation. In February, 1984, all of Singer's and Joseph's remaining claims were settled and were dismissed with prejudice.

On remand, Shannon & Luchs submitted affidavits and computer sheets showing each service performed, the date, the attorney and the time involved. The company claimed fees for all work related to the promissory note and the foreclosure, including the issues that were settled, the litigation in Superior Court, all issues that were appealed, and the foreclosure itself. The District Court held that Shannon & Luchs is entitled to an award of attorneys' fees and awarded the entire amount requested. The appellants filed a timely notice of appeal.

Under the American rule, parties normally bear their own costs and fees. This general rule is subject to only a few exceptions. For example, a court may grant a fee award when specially authorized by contract or statute or when the losing party acted in bad faith. *See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). When the trial court exercises its discretion to award or to deny attorneys' fees, our role on review is to determine if discretion was abused. *See Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985); *Trilon Plaza Co. v. Allstate Leasing Corp.*, 399 A.2d 34, 38 (D.C. 1979).

We agree with the District Court that some award of fees based on the language in the deed of trust and the promissory note signed by Singer and Joseph is appropriate.[1] The District Court, however, erred in its calcu-

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[1] The deed of trust provides in part:

> The Grantor, for himself and his successors and assigns, covenants and agrees as a part of this trust, as follows:
>
> 1. That he will pay the indebtedness evidenced by the note secured hereby, . . . and all other sums which are required to be paid by him under the terms of said promissory note or this Deed of Trust, including costs,

lation of the fee award by failing to describe adequately its consideration of the *amount* of the award. Both the hourly rate and the number of hours claimed must be scrutinized and a reviewing court must be provided with enough detail to enable it to evaluate whether the District Court acted within its discretion.

Although the documentation supporting the District Court's award is extensive, the court's memorandum opinion is barren of any consideration of whether the amount requested was reasonable. For example, we note in passing appellants' claim that the amounts awarded by the District Court include fees attributable to expenses incurred by several attorneys who attended hearings at which only a single attorney's presence was necessary. *See* Brief for Appellants at 19. Such an award, absent some explanation, would appear to be excessive. *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc); *see also National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (fees not recoverable for non-productive time). On remand, the District Court should consider the reasonableness of the attorneys' fees incurred by the appellees in light of the analysis outlined in *Concerned Veterans*, *supra*.

The District Court should likewise justify awarding fees for work on issues that the appellants argue are ineligible for compensation. For instance, the appellants challenge the portion of the District Court's award of attorneys' fees attributable to the appellees' unavailing defense in this court of the initial, undocumented award of attorneys' fees. It is wholly unclear upon what basis the District Court awarded this portion of the attorneys' fees.

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expenses and attorney's fees incurred by the Trustees or the holders of said note with respect to this trust, the said note or the land and premises herein described . . . .

Record Excerpts ("R.E.") at 20.

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Shannon & Luchs argue that they should receive an award of fees because of appellants' bad faith, *i.e.*, even with respect to claims for which appellees were not the prevailing party. The District Court did note in its Memorandum Order that although the amount awarded "may appear to be disproportionate to the amount in controversy, [it has] been caused by plaintiffs' own obstructive behavior in pursuing every device to prevent the foreclosure from taking place." *Singer, et al. v. Shannon & Luchs Co.*, Civil Action No. 82-0151, memorandum order at 2 (D.D.C. Jan. 10, 1984), *reprinted in* R.E. 166. This brief statement, however, was offered by the District Court as a justification of the *amount* of the fees award, rather than as a justification for the award itself. In short, it is unclear whether the District Court used a bad faith rationale to justify an award of fees for claims on which appellees were not the prevailing party. If the District Court did rely on such reasoning, we would find the result to be highly questionable.

Alternatively, the District Court might have based this portion of its award upon the terms of the deed of trust itself. The attorneys' fees provision in the deed of trust arguably could be interpreted to allow Shannon & Luchs to recover attorneys' fees for *any* work "with respect" to the trust or note, even if it does not prevail on the issue. The District of Columbia Court of Appeals, however, has recently noted that "[w]here the merit or necessity of the creditor's claim or defense is successfully challenged, courts may decline to enforce attorney's fee provisions." *Wisconsin Ave. Assocs., Inc. v. 2720 Wisconsin Ave. Coop. Ass'n, Inc.*, 441 A.2d 956, 965 (D.C.) (quoting *Manchester Gardens, Inc. v. Great West Life Assurance Co.*, 205 F.2d 872, 878 (D.C. Cir. 1953)), *cert. denied*, 459 U.S. 827 (1982). *Cf. First Atlantic Bldg. Corp. v. Neubauer Constr. Co.*, 352 So. 2d 103, 106 (Fla. Dist. Ct. App. 1977); *D.A. Tompkins Co. v. Monticello Cotton Oil Co.*, 137 F. 625, 631 (C.C.S.D. Ga. 1905); *Tyler v.*

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Walker, 47 S.W. 424, 424, 101 Tenn. 306, 308-09 (1898). Thus, it is clear that even when a party is entitled to attorneys' fees under the terms of a contract, it may nonetheless be denied an award if it is unsuccessful on the merits of its claim. On remand, the District Court should explicitly reconsider the award of attorneys' fees for the unsuccessful aspects of the first appeal.

The appellants also challenge the District Court's award of attorneys' fees to the appellees for work on the issues settled by the parties. The District Court failed to justify this aspect of the award. It is wholly unclear whether the court determined that Shannon & Luchs was the prevailing party in the settlement and awarded these fees under the contract, or believed that the contract required fees regardless of which party prevailed. Alternatively, the court may have awarded the fees under a bad faith theory. On remand, the District Court should reconsider and clarify its award of attorneys' fees for issues settled out of court.

Finally, it is not clear what effect the District Court's consolidation of the issues of entitlement to fees and amount of fees had on the appellants' opportunity for discovery. If Singer and Joseph did not request discovery, it was waived. If they did request discovery, the District Court should explain why the request was denied. In any event, if discovery is granted, it should be limited to the amount necessary to probe the accuracy of the fee request. *See Concerned Veterans*, 675 F.2d at 1329.

For the above reasons, we vacate and remand for reconsideration of the award of attorneys' fees.

So Ordered.

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